No. 15,322

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM T. PRICE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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FILED
JUL 15 1957
PAUL P. O'BRIEN, CLE

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JURISDICTION.

Jurisdiction is invoked under Section 1291 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted on October 5, 1955, for violation of Section 174 of Title 21 United States Code, unlawful concealment of heroin. He plead not guilty, and was tried by jury before the Honorable George B. Harris, United States District Judge. After a jury verdict of guilty, and the filing of a prior conviction Information, charging two prior convictions of

a narcotic law, appellant was sentenced to a term of 20 years.

The evidence established that on September 30, 1955, Narcotic Agents, after first securing a search warrant and a warrant of arrest, entered the defendant's apartment at 1502 McAllister Street, San Francisco (Tr. 11-12). The appellant was lying on the bed when the agents entered the room. A homemade type stand was sitting alongside the bed the defendant was lying upon, and on this stand was a bindle of 13 grains of heroin (Tr. 5, 13 and 14). At the time this heroin was seized Agent Stenhouse of the Federal Bureau of Narcotics testified the defendant stated in reply to his question as to how the bindle got there, "It was a miracle that we found the stuff as he had only purchased it about 20 minutes before we had come into the room, and that he was just going to a party with it and the girls (Tr. 15). The defendant refused to identify the source of the narcotics (Tr. 15).

At the time of appellant's arrest a bindle of narcotics was found on the person of the woman with whom he shared the apartment (Tr. 38). Appellant told Agent Stenhouse that the bindle found on the person of the woman with whom the appellant shared the apartment "was the same or some of the same stuff that he had bought; that he had placed it in another bindle." (Tr. 15-16).

In the kitchenette, in plain sight, Police Officer Getchell found a hypodermic injection kit on a baseboard (Tr. 38-39).

Appellant took the stand in his own defense, and admitted that he rented the residence in which the arrest took place with his co-defendant Tony Raven (Tr. 79). He claimed that the narcotics were purchased by the same Tony Raven. He admitted being present when the narcotics were delivered (Tr. 80-81). He also admitted that he used narcotics on occasion (Tr. 81). He also admitted that he told Agent Stenhouse it was a miracle that they had found it "because, you know, usually we would use it up and forget about it." He denied, however, concealing the narcotics (Tr. 86).

In his opening statement counsel for the government stated:

> "Federal Narcotics Agents, armed with the search warrant, went to the number on McAllister Street and entered the premises and arrested the defendant and another person who is not engaged in this indictment. They arrested them and on each of these persons found narcotic drugs, and in particular right alongside of the defendant's bed lay a bindle of narcotic drugs, to-wit, 13 grains which we have charged."

QUESTIONS PRESENTED.

1. Did the prosecuting attorney commit prejudicial misconduct?

2. Is the evidence sufficient?

ARGUMENT.

I. THE OPENING STATEMENT OF GOVERNMENT'S COUNSEL WAS PROPER.

Mr. Riordan, counsel for the government, stated in his opening statement that the evidence would disclose that narcotic drugs were found on the night stand located near the bed in which appellant was lying. Appellant claims that counsel for the government "knowingly submitted perjured testimony to the court" in so doing. To begin with, of course, the government's opening statement is not testimony at all. Furthermore, Mr. Riordan's statement as to what the evidence would show is borne out by the testimony.

The particular portion of Mr. Riordan's statement to which appellant objects consists of one sentence, which reads as follows, "They arrested them and each of these persons found narcotic drugs and in particular alongside the defendant's bed lay a bindle of narcotic drugs, to-wit, 13 grains which we charged."

This statement was, of course a correct forecast of what the evidence in fact showed. The statement was accurate and not prejudicial in any way. It takes no citation or authority to demonstrate that appellant's argument is completely without merit.

II. THE EVIDENCE WAS SUFFICIENT.

Appellant was charged with concealing approximately 13 grains of heroin on September 30. On September 30, pursuant to a search warrant and a warrant of arrest federal narcotic agents entered the defend-

ant's apartment. They found next to him on a night-stand, near the bed on which he was lying, 13 grains of heroin (Tr. 13-14). The defendant was asked where it came from, and he replied he had purchased it 20 minutes before (Tr. 15). Furthermore, he admitted that other narcotics found on the person of the woman, who shared the apartment with him, came from the same source (Tr. 15-16). A hypodermic needle was found in plain sight in the defendant's kitchenette (Tr. 38-39).

Appellant admitted at the trial that he knew the narcotics were there (Tr. 80-81). He further stated that if the agents had got there much later it would not have been there, "because we would use it up and forget about it" (Tr. 86). The evidence was more than sufficient, and the jury was practically compelled by the evidence to find the defendant guilty.

CONCLUSION.

The evidence was sufficient and no error has been shown in the trial. The judgment should be, therefore, affirmed.

Dated, San Francisco, California,
July 15, 1957.

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